IN THE

Supreme Court of the United States

FEB 27 1974

MICHAEL RODAK, JR., CLERK

October Term, 1973
No. 73-988

GARY GILBERT CARLSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, was certified for nonpublication. A copy of this opinion is attached as Appendix A to the petition for writ of certiorari herein.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to United States Code, Title 28, Section 2101.

Questions Presented

1. Must the affiant for a search warrant as to allegedly obscene materials be a qualified expert as to legal obscenity and satisfy by factual averments the elements of legal obscenity before the warrant can issue?

2. Did the police violate petitioner's reasonable expectation of privacy in gathering information used in the affidavit for the search warrant?

3. Did amendment of the information on the day of trial to charge misdemeanors place petitioner at an unfair advantage?

Statement of the Case

In an amended information filed by the Los Angeles County District Attorney, petitioner was charged with the following crimes: conspiracy to violate California Penal Code sections 311.2 and 311.5 (Count I); violation of California Penal Code section 311.5 in that he promoted the sale and distribution of matter represented as obscene (Counts II and VI); violation of California Penal Code section 311.2 in that he prepared and offered to distribute obscene films (Counts V and VII). [Cl. Tr. pp. 121-30; Rep. Tr. pp. 4-6.][1] Petitioner pleaded not guilty. [Cl. Tr. p. 131.] His motions under California Penal Code Sections 995 and 1538.5 were denied. [Cl. Tr. pp. 134-35.]

By stipulation petitioner submitted his cause on the testimony contained in the transcript of the preliminary hearing. [Cl. Tr. p. 135; Rep. Tr. pp. 17-18.] Petitioner was found not guilty as to Counts I, V, and VI, but guilty as charged in Counts II and VII. [Rep. Tr. p. 135.]

Petitioner was sentenced to 180 days in the county jail as to each count with the sentences ordered to run consecutively. He appealed the judgment. [Cl. Tr.

[1]It is respondent's understanding that petitioner has submitted copies of the Clerk's and Reporter's Transcripts with his petition. Hence, in the interest of brevity, respondent does not deem it necessary to attach copies of said transcripts to this response.

pp. 136-37; Rep. Tr. pp. 26, 29-30] His conviction was affirmed on August 21, 1973, with the sentence as to Count I (Pen. Code § 311.5) reversed insofar as it imposed punishment therefor. (Appendix A, Petn.)

Statement of Facts[2]

On December 1, 1971, Los Angeles City Police Officer David Weller received a letter from an unknown citizen "complaining about some obscene material that was unsolicited that she had received." The letter contained an "order form" [Exh. 5] with the address of John Harrison, 13609 Victory Blvd., Van Nuys. Weller proceeded to that address and saw that it was a business office complex and that Harrison occupied Suite 135. Weller served search warrant No. 7134 [Exh. 1] on the Van Nuys address on December 2, 1971. Inside Suite 135 Weller found 5 to 8,000 letters stacked up which had been "returned" and stamped with words to the effect of "return to sender." The return address was that of John Harrison at 13609 Victory Boulevard. [Cl. Tr. pp. 31-35.]

Around December 15 Weller and Officer Jamieson staked out the location at 2002 Perry Street, Redondo Beach. During one of the night stakeouts petitioner's wife parked and entered the house. In about two minutes she and petitioner came from the residence, opened the trunk of the vehicle and petitioner removed a large box of envelopes which appeared to be the same as the envelopes which Weller saw returned at the mail

[2]It was stipulated that the evidence heard at the hearing pursuant to Penal Code section 1538.5 was to be used for purposes of the preliminary hearing. [Cl. Tr. pp. 29-30, 110.] This evidence in turn was used for the guilt phase of the trial. [Rep. Tr. p. 18.]

drop at 13609 Victory Boulevard. Petitioner and his wife entered the residence. [Cl. Tr. pp. 39-40, 43.]

On December 16, Weller and Jamieson positioned themselves so they could look into the back yard of petitioner's residence. Through a large sliding glass door Weller saw petitioner seated behind a desk in the den with a stack of small red boxes on one side, and a large quantity of brown manila envelopes on the other. He saw petitioner open and read letters, pick up the manila envelopes, place red boxes in the envelopes, write and place stamps on the envelopes, and staple them shut. He also observed petitioner rip off the bottom portions of what appeared to be order forms with pictures and place order forms in envelopes. From time to time petitioner would leave Weller's view and return with more envelopes. The officers watched petitioners with binoculars from the sidewalk area for about 45 minutes. [Cl. Tr. pp. 40-43.]

Obtaining a closer vantage point, Weller again saw petitioner packaging the red boxes in the envelopes. Weller had a "closer view" and he saw petitioner holding brochures with pictures of sexual activity similar to the brochures which Weller had received in the mail from the "irate citizen." Weller watched petitioner for over an hour. The latter continued addressing envelopes, packaging the red boxes, opening envelopes, addressing order forms, and ripping the bottom half of the forms. Weller saw a large quantity of order forms, some of which appeared similar to the one he had received in the mail with pictures of persons engaged in sexual activity. [Cl. Tr. pp. 43-45.] Some of the brochures were placed into the manila envelopes. [Cl. Tr. p. 75.] Weller saw petitioner open the brochures and

examine them at full length. While Weller could not see the "exact details," he did observe pictures on the brochures of apparent sexual intercourse and oral copulation. [Cl. Tr. pp. 76-77.]

Weller obtained a search warrant for petitioner's residence which he and other officers served on petitioner on December 17. In the den Weller saw 30 to 40 large, brown, stamped envelopes which were addressed, a large quantity of red boxes, loose reels of 8 millimeter film, and brochures depicting "numerous acts of sexual intercourse, sodomy, oral copulation." Weller seized about 626 reels of black and white and color 8 millimeter film [Exh. 7], some in red boxes and some in envelopes, depicting sexual acts, still photos of the same photos on the brochure, and, from petitioner's desk, a number of photos set on cardboard backing [Exh. 6] which appeared to be proofs for the brochures. He also seized mailing lists, "personal business records showing paid out for processing film, brochures; return envelopes with the John Harrison Company;" brochures with similar pictures from the brochure Weller had received in the mail; numerous still photos of sexual acts; cancelled envelopes and orders, and the items listed on the return to the search warrant. [Cl. Tr. pp. 46-50.] Also found in petitioner's desk was an invoice [Exh. 8] for envelopes showing delivery to 4209 Lankershim Boulevard, North Hollywood, with a "printed return" for John Harrison. [Cl. Tr. pp. 51-53, 57.] Also found in the den was a box containing a large quantity of filled out order forms [Exh. 17] for films. [Cl. Tr. pp. 69-72.]

Weller went to 4209 Lankershim Boulevard, North Hollywood, on December 23, where he contacted the owner of the building, Richard Huffine. [Cl. Tr. pp.

55-57.] At the Lankershim address Weller saw a large quantity of boxes and envelopes with the "reading John Harrison Company at 13609 Victory Boulevard," and a large quantity of brochures with sexual acts similar to those he had seen at petitioner's residence on 2002 Perry Street. Weller obtained a search warrant for the Lankershim address and seized the following items there: 5 boxes of envelopes labeled "sexually oriented addressed to adults only" [Exh. 10]; 10 boxes of envelopes labeled "John Harrison, 13609 Victory Blvd., Van Nuys, California" [Exh. 11]; a tray of differently addressed envelopes [Exh. 12] with a "return address of John Harrison." One of the envelopes was addressed to an individual in Florida. Weller also saw a machine at the address "processing" envelopes marked "sexually oriented ad." [Cl. Tr. pp. 62-67.]

It was stipulated that the films [Exh. 7], the advertisements [Exh. 12] and the filled out order forms for films [Exh. 17] were obscene within the meaning and effect of California Penal Code section 311.2. [Cl. Tr. pp. 102-03.]

ARGUMENT

I

Probable Cause for Issuance of a Search Warrant to Seize Obscene Matter Does Not Demand That the Affiant Be an Expert in Legal Obscenity or That the Magistrate Actually View the Matter Sought to Be Seized

Petitioner, in attacking the search warrant for his residence, asserts that Officer Weller's affidavit therefor had to qualify him as an expert in obscenity and show how each of the elements for obscenity were met by the material to be seized. He also contends that the magistrate had to personally observe the material sought for seizure and that he could not rely upon Weller's averment that the material he viewed in petitioner's residence was "similar" to the matter which Weller had received in the mail from the concerned citizen. (Petn. pp. 6-7.)

That the affiant for a search warrant for the seizure of obscene matter need not be an expert in legal obscenity[3] and show in his affidavit facts satisfying all the

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[3]Legal obscenity is defined in California Penal Code section 311 as follows:

> "(a) 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." *See People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433.

However, such is no longer the federal standard for obscenity inasmuch as *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) is no longer the rule. *Miller v. California*, 413 U.S. 15 (1973).

legal elements of obscenity flows logically as a proposition from *People v. Luros*, 4 Cal. 3d 84; 92 Cal. Rptr. 833; 480 P.2d 633. In *Luros* it was argued that a grand jury indictment for conspiracy to violate California Penal Code section 311.2 was void inasmuch as the grand jury received no evidence on contemporary community standards on the issue of probable cause. The California Supreme Court, pages 87-90, rejected the argument and held that the indictment proceedings were only for determining if there was probable cause to believe the matter obscene, not for determining that in fact it was obscene. *See also,*

Aday v. Superior Court, 55 Cal. 2d 789, 798; 13 Cal. Rptr. 415; 362 P. 2d 47;

People v. Aday, 226 Cal. App. 2d 520, 531; 38 Cal. Rptr. 199;

People v. Golden, 20 Cal. App. 3d 211, 216; 97 Cal. Rptr. 476;

People v. Sarnblad, 26 Cal. App. 3d 801, 806-08; 103 Cal. Rptr. 211.

Further as stated in *Theodore v. Superior Court*, 8 Cal. 3d 77, 96-97; 104 Cal. Rptr. 226; 501 P. 2d 234:

> ". . . probable cause, not certainty, is the cornerstone of the warrant-issuing process.
>
> ". . .
>
> ". . . only when the affiant has acted unreasonably in making factual mistakes must those errors be excised from the affidavit before testing the existence of probable cause. . . ."

In the instant case, as stated by the California Court of Appeal (Petn., Appendix A, pp. 20-21), it was not unreasonable for the officer to conclude that the mate-

rials he saw petitioner handling were similar to the material received in the mail from the concerned citizen, which latter material was attached to the affidavit for the magistrate to view.

It appears there is no need for the magistrate to view the material to be seized prior to issuing the search warrant. This is so even in cases where the matter is a film in a public theater or a book in a public bookstore where samples of the allegedly obscene matter can easily be obtained and viewed prior to issuance of the warrant. *See Monica Theater v. Municipal Court*, 9 Cal. App. 3d 1, 13; 88 Cal. Rptr. 71; *People v. Renzy*, 275 Cal. App. 2d 380, 387-88; 79 Cal. Rptr. 777. Indeed, in the case at bar, where the material to be seized was not accessible to the public, but rather, was in petitioner's residence awaiting distribution, it would have been impossible for the magistrate to obtain the material for viewing without having first seized it.

Probable cause for the issuance of the warrant exists if a man of ordinary care and prudence would be led to conscientiously entertain an honest and strong suspicion that the accused is guilty, or that contraband was present. *People v. Golden, supra*, 20 Cal. App. 3d 211, 217. Respondent submits that the warrant properly issued. Officer Weller attached to the warrant the obscene matter which he had received from the complaining citizen. He averred to the magistrate that the brochures he saw petitioner handling were similar to the one he had received. [Cl. Tr. pp. 10-17, 44-45, 76-77.] Respondent submits that it was sufficient for the magistrate to view similar material, rather than the actual material sought to be seized, for purposes of issuing a search warrant.

II

The Officers Observed Petitioner From a Legally Acceptable Vantage Point, and He Should Not Be Allowed to Attack Seizure of the Evidence on This Ground for the First Time on Appeal

Petitioner challenges the activity of the police in viewing him in his residence through open curtains at night with binoculars over a fence from his neighbor's property. Although the neighbor gave the police permission to enter his property, petitioner nevertheless asserts, under *Katz v. United States,* 389 U.S. 347 (1967), that his reasonable expectation of privacy was violated by the police activity. He asserts the California Court of Appeal "blithely ignored" *Katz* in affirming his conviction. (Petn. pp. 7-8.)

Petitioner, however, did not raise this particular issue at the trial level. His argument at the motion to suppress was an attack against the averment in the affidavit for the search warrant that the materials petitioner handled were similar to those attached to the affidavit which were received in the mail. [Cl. Tr. pp. 105-09.] In fact, that attack was petitioner's "entire point." [Cl. Tr. p. 109, lines 2-7.] Nor did petitioner raise the issue in his brief on appeal. (*See* copy of argument portion of petitioner's brief in the California Court of Appeal attached hereto as an Appendix.)[4] Respondent sub-

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[4]Oral argument in the Court of Appeal occurred on August 15, 1973, at which time petitioner's counsel cited *Lorenzana v. Superior Court,* 9 Cal. 3d 626, 108 Cal. Rptr. 585, 511 P. 2d 33, decided June 20, 1973, subsequent to the filing of his brief, wherein evidence was held illegally obtained because the officers were trespassing on the defendant's property. However, the Court of Appeal noted that in petitioner's case, there was no such trespass. (Petn., Appendix A, pp. 9, 15, 20-21.) Moreover, it is obvious from the petition that petitioner is relying on *Katz,* decided in 1967, well before the filing of the case against petitioner on June 30, 1972. [Cl. Tr. p. 124], rather than on *Lorenzana.*

mits, in accordance with reasonable state procedure, that this failure of petitioner to raise the precise issue at trial level precludes its consideration on appeal. *People v. Sirhan,* 7 Cal. 3d 710, 740; 102 Cal. Rptr. 385; 497 P. 2d 1121; *People v. Moore,* 13 Cal. App. 3d 424, 433, 91 Cal. Rptr. 538; *People v. Carter,* 192 Cal. App. 2d 648, 661, 13 Cal. Rptr. 541.

Katz, supra, upon which petitioner relies, is completely different factually. Unlike petitioner's situation, it involved electronic eavesdropping by the police to a conversation which both parties thereto believed private. No such activity was involved in the instant case. The activity of the police in gaining the vantage point upon petitioner's neighbor's yard should not be condemned. Petitioner concedes there was no trespass there. (Petn. p. 8.) Inasmuch as the police were where they had a right to be, respondent submits that petitioner's contention should be disallowed. *Lorenzana v. Superior Court, supra.*

III

Amendment of the Information Was Proper and Caused Petitioner No Prejudice

Petitioner, in the "conclusion" of his petition, claims that allowance of the "amendment to charge misdemeanors on the day of trial" caused him to suffer an "unfair disadvantage." (Petn. p. 9.) The point is without merit.

The trial court may permit an amendment to an information at any stage of the proceedings provided the amendment does not prejudice the substantial rights of the defendant and it does not charge an offense not shown by the evidence taken at the preliminary examination. Cal. Pen. Code § 1009; *People v. Valles,* 197

Cal. App. 2d 362, 371; 7 Cal. Rptr. 362. Here, there is no claim that the amendment charged crimes other than that shown by the evidence taken at the preliminary hearing. Indeed, petitioner's cause was submitted upon that evidence. [Rep. Tr. p. 18.]

It also should be noted that at trial petitioner did not claim surprise or request a continuance so that he could prepare his defense. Petitioner's counsel refused the court's offer of a continuance. [Rep. Tr. p. 5, lines 11-17.] Counsel was obviously ready for trial. Thus, it cannot be said that the amendment caused petitioner any prejudice.

Conclusion

For the foregoing reasons, respondent requests denial of the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

ARGUMENT I.

The materials in question which were a large quantity of reels of film, approximately 628 reels of film, and a quantity of advertising materials in relation to said films, were seized pursuant to the search warrant of the Redondo Beach Police Department. The search warrant was based on an anonymous complaint by an informant which led the officers to a Van Nuys address, where the officers observed certain envelopes with the return address of The John Harrison Company. Subsequent thereto, the officer had a discussion with a postal inspector around the 10th of December, 1971, who advised that the defendant and appellant owned and controlled The John Harrison Company and provided a Redondo Beach address to the officer. Clerk's Transcript Pg. 38, lines 15-28. Clerk's Transcript Pg. 39, lines 1-4. The officer then proceeded to the Redondo Beach address pursuant to same, and on two separate nights, made the observations referred to and at his home address saw material that looked similar only and materials that he could not discern the exact details. In order for a Magistrate or a Judge to issue a search warrant in reference to materials covered by the First Amendment of the U.S. Constitution, the Magistrate or Judge must be convinced that the three pronged tests of the *Roth* case have been met. *Roth vs. United States,* 354 U.S. 476. However, in the residence here, the officers showed certain material received from the anonymous informant to the Magistrate, but it was not these materials that supported the warrants, but the officer's statements that he observed similar materials. The officer was not qualified as an expert nor did he

say the materials were exactly the same, nor did the officers testify that the materials he observe through the window of the Redondo Beach property appealed primarily to the prurient interest of the average adult, that the materials transcended community standards in depicting sex and nudity and that the materials taken as a whole were utterly without redeeming social value. Instead, he merely stated that the materials appeared to be similar and that he could not see the exact details nor could he read any of the printed materials and yet based upon those statements, the Magistrate or Judge who issued the search warrant determined that the officer's observations were obscene material, despite the fact that the Court did not personally observe any of the materials that the officer observed in the Redondo Beach premises.

ARGUMENT II

The defendant was found not guilty of all counts except counts 2 and 7. Count 2 being a 311.5 Penal Code violation and Count 7 being a 311.2 Penal Code violation, both misdemeanors. An examination of the Amended Information shows that Count 2 as alleged in the 311.5 violation, was alleged to have been committed on December 17, 1971, and Count 7, the 311.2 violation, was also alleged to have been committed on or about December 17, 1971. A reading of the transcript will show that there is only one incident involved on the 17th of December, 1971, and that both counts involve the same facts, but are merely different ways of charging the same facts as a crime, one being to unlawfully promote the sale and distribution of matter represented to be obscene and the other being one involving the preparation, etc. of obscene materials or having same in their possession with intent to distrib-

ute obscene material. A reading of the factual materials in the transcript will show that the only proof in reference to the defendant was that he was apparently preparing for distribution, the films in question on the 17th day of December, 1971 so that both counts relate to the same fact and therefore, the defendant by receiving a consecutive sentence on the 2 counts is being doubly punished, despite the prohibitions of Section 654 of the Penal Code.

CONCLUSION

The convictions herein should be reversed for the reasons that the search warrant was not based upon the Magistrate viewing of the materials personally, but merely upon the officer relating to the Magistrate that the materials that the officer observed were similar to the ones shown to the Magistrate. The convictions should further be reversed on the basis that allowing an amendment to charge misdemeanors on the day of trial is an unfair disadvantage to the defendant, when the defendants are prepared to defend only one felony conspiracy and at the last minute are required to defend all six new misdemeanor charges not involving conspiratorial conduct, and in addition, at least one of the sentences should be reversed on the basis that the defendant received double punishment for the same conduct in that consecutive sentences of 180 days each for the 2 counts involving the same facts occurring on the same day, which were merely charged in different counts is prohibited by Section 654 of the Penal Code.

Respectfully submitted,

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